

Exhibit B

Draft Final Implementation Agreement

**Draft Final
11/22/04**

**LOWER COLORADO RIVER
MULTI-SPECIES CONSERVATION PROGRAM**

IMPLEMENTING AGREEMENT

(date to be inserted)

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**LOWER COLORADO RIVER
MULTI-SPECIES CONSERVATION PROGRAM
IMPLEMENTING AGREEMENT**

1. PARTIES

This Lower Colorado River Multi-Species Conservation Program (LCR MSCP) Implementing Agreement (Agreement) is made and entered into by and among the following Parties:

Arizona Parties: The Arizona Department of Water Resources, the Arizona Game and Fish Commission, the Arizona Power Authority, the Central Arizona Water Conservation District, the Yuma Mesa Irrigation and Drainage District, the Yuma Irrigation District, the North Gila Valley Irrigation and Drainage District, the Wellton-Mohawk Irrigation and Drainage District, the Yuma County Water Users Association, the Salt River Project Agricultural Improvement and Power District, and the Mohave County Water Authority;

California Parties: The Coachella Valley Water District, the Colorado River Board of California, the Imperial Irrigation District, the Palo Verde Irrigation District, the San Diego County Water Authority, the Southern California Public Power Authority, Bard Irrigation District, Department of California Fish and Game, and The Metropolitan Water District of Southern California;

Federal Parties: The Bureau of Reclamation (Reclamation), the United States Fish and Wildlife Service (Service), the National Park Service (NPS), the Bureau of Indian Affairs (BIA), and the Bureau of Land Management (BLM); and, the Western Area Power Administration (Western).

Nevada Parties: The Colorado River Commission of Nevada, the Nevada Department of Wildlife, Basic Water Company, and the Southern Nevada Water Authority.

Other Parties: Any person or entity added as a Third Party Authorized to Take pursuant to section 16 of this Agreement.

2. RECITALS AND PURPOSES

A. The Arizona, California, and Nevada Parties, in partnership with the Federal Parties, have developed the Lower Colorado River Multi-Species Conservation Program to provide the basis for compliance with section 10(a)(1)(B) of the Federal Endangered Species Act (ESA) by the State Parties and section 7 of the ESA by the Federal Parties.

B. The Planning Area for the LCR MSCP, as depicted on Figures 1-1 in the HCP and BA and described in sections 1.4.1 of the HCP and BA, is defined as areas up to and including the full-pool elevations of Lakes Mead, Mohave, and Havasu and the historical floodplain of the Colorado River from Lake Mead downstream to the Southerly International Boundary with Mexico. The historical floodplain includes all those lands that are or have been affected by the meandering or regulated flows of the Colorado River, which are delineated by significant changes in elevation between the floodplain and the adjacent uplands.

C. The Planning Area provides habitat for the following Covered Species which are listed as endangered or threatened under the ESA as of the Effective Date:

Bonytail
Humpback chub
Razorback sucker
Desert tortoise
Southwestern willow flycatcher
Yuma clapper rail

D. The Planning Area also provides habitat for the following Covered Species which are not listed as endangered or threatened under ESA as of the Effective Date:

Threecorner milkvetch

Sticky buckwheat
MacNeill's sootywing skipper
Flannelmouth sucker
Relict leopard frog
Flat-tailed horned lizard
Western least bittern
California black rail
Yellow-billed cuckoo
Elf owl
Gilded flicker
Gila woodpecker
Vermilion flycatcher
Arizona Bell's vireo
Sonoran yellow warbler
Summer tanager
Western red bat
Western yellow bat
Desert pocket mouse
Colorado River cotton rat
Yuma hispid cotton rat

E. The Planning Area also provides habitat for the following species (evaluation) that are not listed as endangered or threatened under the ESA as of the Effective Date, and for which coverage under the section 10(a)(1)(B) permit is not sought at this time:

Sonoran Desert toad (Colorado River toad)
Lowland leopard frog
California leaf-nosed bat
Pale Townsend's big-eared bat

F. The Conservation Measures described in Chapter 5 of the HCP will fully mitigate the effects of incidental take of Covered Species resulting from the Covered Actions and Covered Activities and will, to the maximum extent practicable, minimize,

and mitigate the effects of incidental take of Covered Species resulting from the Covered Actions and Covered Activities. In addition, special management considerations for species and Critical Habitat were developed and incorporated in the Conservation Plan which contribute to conservation goals for the Covered Species.

G. The Service has found, following opportunity for public comment, that: 1) any taking of Covered Species within the LCR MSCP planning area as a result of Covered Actions and Covered Activities in accordance with the LCR MSCP as implemented will be incidental to the carrying out of otherwise lawful activities; 2) the LCR MSCP as implemented will, to the maximum extent practicable, minimize, and mitigate the impacts of such incidental taking; 3) the Parties identified and provided for in the FMA will ensure that adequate funding for the LCR MSCP will be provided; 4) the requested taking of Covered Species as a result of Covered Actions and Covered Activities will not appreciably reduce the likelihood of survival and recovery of such species in the wild; and 5) the LCR MSCP, as implemented, will satisfy and fulfill all measures agreed upon by the Parties for the purposes of the LCR MSCP (including procedures determined by the Service to be necessary to address Unforeseen Circumstances).

H. This Agreement:

- Ensures implementation of each of the terms of the HCP by the Non-Federal and Federal Parties;
- Describes remedies and recourse should any Party fail to perform its obligations as set forth in this Agreement;
- Provides assurances to Permittees that, to the extent authorized by law, as long as the terms of the HCP, the Incidental Take Authorization, and this Agreement are properly implemented, no additional mitigation will be required of Permittees with respect to the Covered Actions and Covered Activities for the Covered Species except as provided for in this Agreement;
- Assures Permittees that compliance with the terms of the HCP and this Agreement is sufficient for Permittees to obtain and retain the Permit and adequately

provides for the mitigation of the effects of the incidental take of the Covered Species resulting from the Covered Actions and Covered Activities; and

- Anticipates that the Federal Parties will fulfill their obligations under the ESA, the Funding and Management Agreement (FMA), and this Implementing Agreement (IA).

3. DEFINITIONS

The capitalized terms used in this Agreement shall have the meaning ascribed to them in this section. To the extent that the definitions incorporate covenants and agreements, such covenants and agreements shall bind the Parties. Terms used in this Agreement and specifically defined in the ESA or in regulations adopted by the Service under the ESA have the same meaning as in the ESA and those implementing regulations, unless this Agreement expressly provides otherwise.

1. **“2001 Biological Opinion”** means that biological opinion issued by the Service on January 12, 2001 entitled “Biological Opinion for Interim Surplus Criteria, Secretarial Implementation Agreements, and Conservation Measures on the Lower Colorado River, Lake Mead to the Southerly International Boundary, Arizona, California, and Nevada.”

2. **“Adaptive Management”** means an iterative program designed to review and use the results of information gathered through monitoring and research to adjust Conservations Measures, management strategies, and practices where appropriate in implementing the Conservation Plan.

3. **“Adaptive Management Program” or “AMP”** means the program of Adaptive Management that will be undertaken by the Parties as part of the Conservation Plan as described in section 11 of this Agreement and section 5.12 of the HCP.

4. **“Agreement” or “IA”** means this Implementing Agreement.

5. **“BA”** means that biological assessment for the specified Covered Actions prepared for the LCR MSCP by the Federal Parties and transmitted to the Service on *(date to be inserted)* in accordance with section 7 of the ESA.

6. **“Biological Opinion” or “BO”** means the section 7 biological opinion issued by the Service for the LCR MSCP.
7. **“Certificate of Inclusion”** means a certificate issued by a Permittee to a non-federal person, firm, or entity that has agreed to be bound by the terms of the HCP and the Permit pursuant to section 16.1 of this Agreement.
8. **“Conservation Measure”** means measures identified in Chapter 5 of the HCP for the benefit of the Covered Species or developed pursuant to the Adaptive Management Program including specific activities implemented on an annual basis by the Program Manager or, in appropriate circumstances, other Parties to this Agreement.
9. **“Conservation Plan”** means the habitat conservation plan described in section 11 of this Agreement.
10. **“Covered Actions”** means those actions described in Chapter 2 of the BA, for which Incidental Take Authorization for Covered Species is sought pursuant to the LCR MSCP.
11. **“Covered Activities”** means those activities described in Chapter 2 of the HCP, for which Incidental Take Authorization for Covered Species is sought pursuant to the LCR MSCP.
12. **“Covered Species”** means those twenty-seven (27) species listed in Table 1-2 of the HCP and in sections 2(C) and 2(D) of this Agreement for which Incidental Take Authorization for Covered Actions and Covered Activities is sought pursuant to the LCR MSCP.
13. **“Critical Habitat”** means those areas within the Planning Area that have been designated by the Secretary of the Interior to be essential for the continued existence of certain of the Covered Species in accordance with the ESA.
14. **“Days”** means calendar days unless otherwise specified. If the date of performance is on a Saturday, Sunday, or observed state or Federal holiday, the date of performance shall be construed to be the next business day subsequent to the calculated date of performance.

15. **“Effective Date”** means the date on which this Agreement takes effect, as provided in section 6.1 of this Agreement.

16. **“EIS/EIR”** means the joint environmental impact statement and environmental impact report issued pursuant to National Environmental Policy Act (NEPA) and the California Environmental Quality Act for the LCR MSCP.

17. **“Environmental Laws”** means Federal laws and regulations governing or regulating the impact of Covered Actions and Covered Activities on land, water, or biological resources as they relate to Covered Species, including, but not limited to the ESA, the NEPA, the Migratory Bird Treaty Act (MBTA), the Fish and Wildlife Coordination Act, the Fish and Wildlife Act of 1956, and the Clean Water Act (Title 33, United States Code sections 1251 *et seq.*).

18. **“ESA”** means the Federal Endangered Species Act of 1973, as amended.

19. **“Funding and Management Agreement”** or **“FMA”** means that agreement which provides for the administration, financing, and implementation of the LCR MSCP.

20. **“Habitat Conservation Plan”** or **“HCP”** means the habitat conservation plan prepared by the State Parties pursuant to section 10(a)(1)(B) of the ESA for purposes of the LCR MSCP.

21. **“Incidental Take Authorization”** or **“ITA”** means, collectively, (i) the LCR MSCP section 10(a)(1)(B) incidental take permit and (ii) any incidental take statement issued by the Service as part of a Biological Opinion which authorizes take by Federal agencies pursuant to the LCR MSCP.

22. **“LCR MSCP”** means the Lower Colorado River Multi-Species Conservation Program.

23. **“Listed Species”** means those Covered Species that are listed by the Service as endangered or threatened on the Effective Date as shown in Table 1-2 of the HCP and BA and as listed in section 2(C) of this Agreement.

24. **“Lower Colorado River”** means the Colorado River within the Planning Area as provided in section 2(B) of this Agreement.

25. **“Minor Modification”** means a clarification or minor change to the LCR MSCP as defined in section 14.1 of this Agreement.
26. **“Participant Group”** means a group of organizations participating in the Program as described in section 7.3.1 of the FMA.
27. **“Party”** means an entity that is a signatory to this Agreement. Such entities may be referred to individually as “Party” or collectively as “Parties.”
28. **“Permit”** means the section 10(a)(1)(B) incidental take permit issued by the Service pursuant to the HCP for the LCR MSCP.
29. **“Permittee”** means a non-federal person, firm, or entity that has been authorized to take Covered Species pursuant to this Agreement and the Permit.
30. **“Program Documents”** means the HCP, BA, EIS/EIR, FMA, IA, BO, and the Permit.
31. **“Program Manager”** means an employee of Reclamation whose responsibility it is to plan for and take such actions as may be required to implement the LCR MSCP pursuant to the provisions of this Agreement and the FMA.
32. **“Reclamation”** means the United States Bureau of Reclamation.
33. **“Secretary”** means the Secretary of the Interior and/or his/her designee.
34. **“Service”** means the United States Fish and Wildlife Service.
35. **“State Party”** means an entity described as an Arizona Party, a California Party, or a Nevada Party.
36. **“Steering Committee”** means the body established by section 7.3 of the FMA.
37. **“Third Party Authorized to Take”** means any person, firm, or entity that receives an ITA pursuant to section 16 of this Agreement.
38. **“Unlisted Species”** means a species that is not listed as endangered or threatened under the ESA as of the Effective Date.

4. PRIORITY OF PROGRAM DOCUMENTS

4.1 Program Documents

The terms of this Agreement and the terms of the other Program Documents are intended by the Parties, and shall be interpreted, to be complementary. In the event of any conflict between the terms of this Agreement and the HCP, BA, or EIS/EIR, the terms of this Agreement will control. In the event of a conflict between the FMA and this Agreement, the terms of the FMA will control.

4.2 Permit Controls

The terms of the Permit and the terms of the other Program Documents are intended by the Parties, and shall be interpreted, to be complementary. In the event of any conflict among the terms of the Permit and other Program Documents, the terms of the Permit will control.

5. PREVIOUS AGREEMENTS SUPERCEDED

This Agreement and the FMA are intended to be final and binding agreements among the Parties regarding the LCR MSCP. All other agreements and understandings, written or oral, which have previously been entered into or agreed to by and among the Parties prior hereto regarding the LCR MSCP are superceded by this Agreement and the FMA. Notwithstanding the foregoing, nothing in this Agreement or the other Program Documents shall be deemed to supercede any agreement related to the 2001 Biological Opinion and the implementation of the reasonable and prudent measures set forth in the 2001 Biological Opinion.

6. EFFECTIVE DATE AND TERM

6.1 Effective Date

This Agreement shall become effective as of the date the Permit is issued by the Service.

6.2 Term of Agreement

This Agreement shall remain in effect for a term of fifty (50) years from the Effective Date, unless terminated or extended prior to that date.

6.3 Extension of the Permit

The Service may, with the agreement of the Parties, from time to time extend the Permit beyond its current term in compliance with the applicable law and regulations in force on the date of any such extension.

6.4 Permit suspension

The Service may suspend the Permit if the Permittees are not in compliance with the conditions of the Permit, this Agreement, the FMA, or any applicable Federal laws and regulations. For the purposes of the LCR MSCP, the procedures applicable to any suspension shall be in accordance with the Federal regulations in effect at the time of the suspension; provided however, that at a minimum the Permittee shall be afforded the procedural rights set forth in section 50 C.F.R. section 13.27 in existence on the Effective Date. The suspension shall remain in effect until the Service determines that the Permittees have corrected the deficiencies. The Permit may be partially suspended with respect to specified Covered Species, or to a portion of the Planning Area or Covered Activities, or in relation to a specific Permittee or specific Permittees. In the event of a partial suspension, the portion of the Permit not subject to suspension shall remain in full force and effect. Permit suspension as a result of Changed Circumstances shall be in accordance with the applicable terms of this section 6.4 and section 13 of this Agreement.

6.5 Permit revocation

This section is not intended to be applied before December 12, 2004 or applicable date pursuant to Spirit of Sage litigation in U.S. District Court.

The Service shall not revoke this Permit for any reason except those listed in applicable regulations, or unless the Covered Activities would be inconsistent with the criteria set forth in 16 U.S.C. 1539 (a)(2)(B)(iv) and this inconsistency has not been remedied in a timely fashion. Notwithstanding the foregoing, this Permit will only be

revoked if the Service, the Permittees, and other interested parties have not been successful in remedying any such inconsistency through other means. The Permit may be partially revoked with respect to specified Covered Species, or to a portion of the Planning Area or Covered Activities, or in relation to a specific Permittee or specific Permittees. In the event of a partial revocation, the portion of the Permit not subject to the revocation shall remain in full force and effect. All Conservation Measures in the HCP that are continued in effect after any Permit revocation shall be taken into account by the Service and credited toward any future efforts by the Permittees and other Parties to ensure that any Covered Actions or Covered Activities are in compliance with requirements of the ESA. This provision shall survive any revocation of the Permit and shall remain in full force and effect thereafter.

7. INTEGRATION OF BA AND HCP

7.1 Comprehensive Plan

The LCR MSCP is a comprehensive plan. It addresses the effects of all Federal Covered Actions and non-federal Covered Activities on Covered Species and their habitats. The LCR MSCP is intended to secure ITAs to authorize incidental take of Covered Species, that are now or hereafter listed as endangered or threatened pursuant to the ESA, that may occur as a result of the Covered Actions and Covered Activities.

7.2 Legal Uncertainty Regarding Non-Discretionary Federal Actions

Take that occurs as the incidental result of Covered Actions undertaken by Reclamation, Western, and the other Federal agencies identified in the BA (i.e., NPS, BIA, the Service, and BLM) may only be authorized by the Service pursuant to the provisions of section 7 of the ESA. However, certain Covered Actions that are undertaken by Reclamation and Western are nondiscretionary in nature (e.g., delivery of water to Mexico pursuant to the 1944 Water Treaty, delivery of water to parties holding permanent water delivery contracts with the Secretary). Non-discretionary actions of the Federal Parties are not subject to the consultation and/or conference requirements of section 7 of the ESA. In addition, many of Reclamation's non-discretionary Covered Actions occur as the result of contracts with non-federal Parties and, arguably, might be

included as part of the section 10(a)(1)(B) Permit (e.g., water is delivered by Reclamation as the result of water orders by non-federal entities pursuant to water delivery contracts). In order to make the LCR MSCP as comprehensive as possible, while avoiding arguments and challenges about whether any particular Federal action is discretionary or non-discretionary, and whether incidental take authority should be granted pursuant to section 7 or section 10: (i) the effects of all Covered Actions, both discretionary and non-discretionary and Covered Activities have been described and analyzed in both the BA and the HCP; and (ii) the Permittees are seeking an incidental take permit for their Covered Activities pursuant to section 10 of the ESA; and (iii) Reclamation and the other Federal Parties are seeking incidental take authorization for their Covered Actions pursuant to section 7 of the ESA.

7.3 No Obligation to Consult on Non-Discretionary Actions or Actions that Do Not Affect Listed Species

Notwithstanding the inclusion of Federal non-discretionary actions within the identified Covered Actions, this Agreement shall not be interpreted to require consultation and/or conference pursuant to section 7 of the ESA with respect to Federal non-discretionary actions for the purpose of compliance with the provisions of the ESA on the Lower Colorado River or for any other purpose or in any other case or circumstance. The approach taken in this regard for the LCR MSCP is undertaken for the specific purposes and as identified in sections 7.1 and 7.2 of this Agreement. Nor shall anything in this Agreement be interpreted to require consultation and/or conference pursuant to section 7 of the ESA with respect to Federal actions that do not affect Listed Species.

7.4 Compliance with Provisions of Biological Opinion

The Federal Parties and the Permittees agree that they shall comply with all applicable reasonable and prudent measures and terms and conditions within the Biological Opinion, notwithstanding the fact that such reasonable and prudent measures and terms and conditions may arise out of, or be connected with, incidental take resulting from Covered Actions that are non-discretionary or do not affect Listed Species.

7.5 No Allocation of Individual Responsibility to Mitigate for Effects of Covered Actions and Covered Activities

The Parties have quantified the effects of the Covered Actions and Covered Activities for development of a comprehensive conservation plan. The Parties have not identified specific impacts that individual Covered Actions and Covered Activities have had or will have upon the Covered Species and their habitats because the decline of species and habitats along the Lower Colorado River has been caused by many factors, including but not limited to: (i) introduction of non-native species; (ii) permanent facilities constructed prior to enactment of the Environmental Laws; (iii) stochastic events, both within and beyond the Planning Area, that are beyond the control of any of the Parties; and, (iv) development and other activities undertaken within and adjacent to the Lower Colorado River.

8. FUTURE SECTION 7 CONSULTATIONS – COVERED ACTIONS AND COVERED ACTIVITIES

In the event that, despite implementation of the LCR MSCP and cooperative efforts among the Service, the Program Manager, and the Steering Committee, any Federal Party determines that a section 7 consultation or re-initiation of consultation is required pursuant to applicable Federal law for any Covered Action, the Federal Party shall give notice thereof to the Program Manager, the Steering Committee and the Permittees, and such Permittees shall be treated as Applicants in any such section 7 consultation, and be entitled to fully and completely participate in all matters involved in such consultation or re-initiation of consultation. Costs associated with modifications to the Conservation Plan resulting from any such consultation shall be dealt with in accordance with section 9.9 of the FMA.

The Service has evaluated the direct, indirect, and cumulative effects of the Covered Actions and Covered Activities in its Biological Opinion issued in connection with the LCR MSCP and issuance of the Permit. As a result, and to the maximum extent allowable, in any consultation under section 7 of ESA subsequent to the Effective Date with regard to the Covered Actions or Covered Activities, including consultations

involving the Permittee(s) or entity with Third Party Take Authorization with regard to Covered Species, the Service shall ensure that the biological opinion issued in connection with the proposed action or project that is the subject of the future consultation is consistent with the Biological Opinion.

9. FUTURE SECTION 7 CONSULTATIONS – OTHER ACTIONS AND ACTIVITIES

9.1 Notice

In any section 7 consultation subsequent to the Effective Date involving activities, other than Covered Actions or Covered Activities, undertaken by any person, firm, or entity that could have an effect upon Covered Species and their habitats within the Planning Area, the Service shall, to the maximum extent allowed by Federal statutes and regulations, give notice thereof to the Program Manager, the Steering Committee, and the Permittees.

9.2 Contents of Biological Opinion

The Service agrees that the terms of any biological opinion issued in connection with projects that are independent of the Covered Actions and the Covered Activities shall not impose or result in any additional obligation, cost, or expense to the LCR MSCP.

10. SPECIES

10.1 Covered but Currently Unlisted Species – Section 10 Permit

Covered Species that are not listed on the Effective Date as endangered or threatened under the ESA have been treated in the LCR MSCP as if they are Listed Species. In the event an unlisted Covered Species becomes a Listed Species in the future, incidental take of that species shall, without any further action on the part of the Permittees, be immediately authorized pursuant to the terms of the Permit.

10.1.1 Savings Provision

If it is judicially determined that the Service was not authorized to cause the Permit to become effective automatically as to Covered Species not listed as of the Effective Date, the Service shall accept the minimization and mitigation measures in the LCR MSCP as the basis for an application for an amendment to or separate Permits, MBTA Permits, and/or other Incidental Take Authorizations. The Service shall use reasonable efforts to review and process the application expeditiously so as to ensure, provided the Permit amendment or application meets the requirements of ESA and other applicable Federal laws, that the Incidental Take Authorization is effective concurrently with the listing of the Covered Species under ESA. In issuing such Permits, amendments, and/or Incidental Take Authorizations, and to the extent that such judicial determination creating the circumstances requiring such additional review and processing allows, the Service shall not request, impose, recommend, or require further mitigation, conservation, compensation, enhancement, or other protection for such Covered Species except as expressly provided in the Permit, this Agreement, and the FMA.

10.2 Covered but Currently Unlisted Species – Section 7

Pursuant to the provisions of section 7 of the ESA and its implementing regulations, incidental take statements contained in Biological Opinions apply only to species listed as endangered or threatened under the ESA. In the event an unlisted Covered Species becomes listed in the future, the Service shall give due consideration to, and full credit for, those Conservation Measures provided in the Conservation Plan that benefit such species as part of any section 7 consultation regarding the Covered Actions.

10.3 Additions to the Covered Species List

In the event the Permittees desire to add additional species to the list of Covered Species, the Permittees shall propose an amendment of the HCP and request an amendment to the Permit. Such request shall be supported by sufficient evidence to meet the requirements of the ESA. The Service shall give due consideration to, and full credit for, Conservation Measures previously implemented as part of the Conservation Plan that benefit such species.

10.4 Future Listings of Other Species

To the extent allowed by applicable law, in evaluating whether to list a species that is not a Covered Species, but which may, from time to time, be present in the Planning Area, the Service shall: (i) provide advance notice to the Program Manager who shall then inform the Steering Committee and Permittees of the potential listing, (ii) consider the conservation benefits already provided to the species by the LCR MSCP; and (iii) coordinate with the Program Manager and the Steering Committee to identify what changes to the Conservation Plan, if any, would be sufficient to avoid listing within the Planning Area. In the event that any such species is listed within the Planning Area, the Service shall give due consideration to, and full credit for, Conservation Measures previously implemented as part of the Conservation Plan that benefit such species in any proposed amendment to the HCP and the Permit or in any section 7 consultation regarding the Covered Actions.

11. THE CONSERVATION PLAN AND ADAPTIVE MANAGEMENT

11.1 The LCR MSCP Conservation Plan

11.1.1 Content

The Conservation Plan consists of: (i) those measures described in Section 1.1 of the HCP that are required to be performed by Reclamation pursuant to the 2001 Biological Opinion; (ii) those measures described in Section 1.1 of the HCP that are required to be performed by Reclamation pursuant to the April 30, 1997 and April 30, 2002 Biological Opinions (Lower Colorado River Operations and Maintenance); (iii) those Conservation Measures described in Chapter 5 of the HCP; and (iv) those Conservation Measures that are developed after the Effective Date pursuant to the AMP. Implementation of the Conservation Plan will occur pursuant to the Program Documents.

11.2 Goals of the Conservation Plan

As more particularly described in section 5.2.1 of the HCP, the goals of the Conservation Plan with respect to Covered Species are:

- To avoid, minimize, and fully mitigate adverse effects of Covered Actions and Covered Activities and LCR MSCP implementation on Covered Species and their habitat;
- To contribute to the recovery of listed species; and
- To reduce the likelihood of future listing of Unlisted Species.

11.3 Measurement of Biological Goals and Objectives-Importance of Habitat

The Covered Species could be affected by actions, both natural and man-made, within and outside the Planning Area, which are beyond the control of the Parties and unrelated to the Covered Actions and Covered Activities. Therefore, the effectiveness of the Conservation Plan in minimizing and mitigating the effects of the Covered Actions and Covered Activities on the Covered Species will be considered on the basis of the implementation of the Conservation Measures set forth in the HCP or as modified through the AMP.

11.4 Importance of Adaptive Management

The initial Conservation Measures proposed to be funded by the Parties are sufficient to meet the incidental take requirements of the ESA. However, the number of Covered Species, the paucity of data and information regarding some species, the variety of habitats found within the Planning Area, the likelihood of new environmental challenges, and the budget of the LCR MSCP, make implementation of a science-based AMP that relies on the best available scientific information and knowledge an essential component of the LCR MSCP. The AMP will provide guidance to all Parties regarding monitoring, research, and management practices to benefit the Covered Species. Each Party shall, to the maximum extent practicable, fully cooperate with the AMP.

11.4.1 Adaptive Management Program

As more particularly illustrated in Figure 5-4 and described in section 5.12 of the HCP, Reclamation shall implement an iterative Adaptive Management Program for the LCR MSCP that utilizes the best scientific information and knowledge, together with the results of monitoring and research, to evaluate the successes and failures of the

Conservation Plan. Because changes over time and adaptive responses are contemplated by the LCR MSCP, changes proposed as the result of the AMP or as a result of changed circumstances will not require an Amendment to the LCR MSCP, the Permit, or this Agreement. If unforeseen circumstances occur as provided in section 13 of this Agreement, they will be resolved through internal changes in the Conservation Plan through Adaptive Management. Changes proposed as a result of unforeseen circumstances should not require an Amendment to the LCR MSCP, the Permit, or this Agreement.

11.4.2 Changes Resulting From Adaptive Management Program

All proposed changes as a result of the Adaptive Management Program shall be identified in the annual implementation report, work plan, and budget submitted to the Steering Committee and thereafter communicated to the Service for review, comment, and approval as provided in section 7.4 of the FMA.

12. FUNDING AND MANAGEMENT AGREEMENT

The Parties have entered into a FMA that provides for the sharing of the costs of the LCR MSCP. A Party's share of the annual LCR MSCP costs shall be determined and paid in accordance with section 8 of the FMA. In addition, the FMA provides the terms and conditions agreed upon between the Permittees and the Federal Parties regarding the financing, implementation, and administration of the LCR MSCP. Execution of this Agreement and the FMA constitutes each Party's commitment to the Service to meet their funding obligations in accordance with the FMA and to implement those applicable conservation, avoidance, minimization, and mitigation measures set forth in the Conservation Plan.

13. CHANGED CIRCUMSTANCES AND UNFORESEEN CIRCUMSTANCES

13.1 Changed Circumstances In General

Section 5.12.3 and Table 5-13 of the HCP identify certain changed circumstances affecting Covered Species or their habitats that have been reasonably anticipated and

planned for in the LCR MSCP and describes the remedial measures that will be implemented in the event that such changed circumstances occur.

13.1.1 Specific Changed Circumstances

The following have been identified as changed circumstances for purposes of the LCR MSCP:

- Unsuccessful creation of habitat, including failure that is caused by drought or insufficiency of water, regardless of cause;
- Destruction or loss, in whole or in part, by flooding and/or sedimentation of backwaters and marshes that have been created or restored;
- Created cottonwood-willow and honey mesquite land cover that provide habitat for Covered Species in conservation areas are lost as a result of floods;
- Fish in rearing facilities or in the stocking process are lost for any reason;
- Rearing facilities or aquaculture techniques are not capable, or fail for any reason, to provide sufficient numbers or sizes of fish to meet augmentation goals;
- A toxic or hazardous material spill or deposit occurs which impacts areas that have been created or restored; or
- Future listing of a Covered Species that is not listed on the Effective Date.

13.1.2 Remedial Measures

If any Party discovers that a changed circumstance has occurred, it will give notice to the Program Manager who will then give notice to the other Parties as soon as practicable after learning of the changed circumstance. In the event any changed circumstance occurs, the Program Manager shall implement the remedial measures, or cause those measures to be implemented, as specified in Table 5-13 of the HCP.

13.2 Unforeseen Circumstances in General

Any change in circumstances not identified as a changed circumstance in section 5.12.3 and Table 5-13 of the HCP shall be considered an unforeseen circumstance. The

obligations of the Service in regard to unforeseen circumstances are set forth in 50 C.F.R. 17.22.

13.2.1 Response to Unforeseen Circumstances

Upon a determination that an unforeseen circumstance has occurred and that additional Conservation Measures are required to address the unforeseen circumstance that were neither identified in the Conservation Plan nor capable of implementation within the budget set forth in Chapter 7 of the HCP, and provided that the Permittees are in compliance with any applicable terms of the LCR MSCP, the cost of any additional Conservation Measures will be borne by the Federal government, other governmental agencies, private conservation organizations, or other private entities who are not part of the LCR MSCP. Costs associated with modifications to the Conservation Plan resulting from any such Conservation Measures shall be dealt with in accordance with section 9.9 of the FMA.

13.2.2 Avoidance of Effect on Permittees

If additional actions are required for the benefit of Covered Species as the result of an unforeseen circumstance, the Federal Parties shall adopt measures that address the effect of the unforeseen circumstance on the relevant species and its habitat. The Federal Parties shall endeavor to adopt those actions or measures that will have the least effect upon the Permittees and the respective constituents served by the Permittees. Prior to undertaking or attempting to impose any such additional action, including limitations on the use of land or water for the benefit of Covered Species, the Federal Parties shall consider all practical alternatives, including but not limited to land purchase and exchange programs, additional public education, translocation programs, propagation programs, and acquisition of conservation easements.

13.2.3 Cooperation of Permittees

If an unforeseen circumstance should occur, the Permittees shall cooperate with and assist the Federal Parties, to address the unforeseen circumstance.

14. MODIFICATIONS TO THE LCR MSCP AND AMENDMENTS TO THE PERMIT

14.1 Minor Modifications

Minor Modifications are changes to the LCR MSCP of a minor or technical nature where the effect on Covered Species, levels of take, and the Permittees' ability to implement the LCR MSCP, are either beneficial or are not significantly different than those described in the LCR MSCP as originally adopted. Minor Modifications to the LCR MSCP shall not require amendments to this Agreement or the Permits. Minor Modifications may include changes to the Conservation Measures pursuant to the AMP.

Any Party may propose a Minor Modification to the Conservation Plan by providing notice including a statement of the reason for the proposed modification and an analysis of its environmental effects, if any, to the Project Manager. The Project Manager shall present the Minor Modification to the Steering Committee for its approval and if it is approved by the Steering Committee the Project Manager shall forward the proposal, along with the analysis, to the Service for its approval. A Minor Modification shall become effective on a date set by the Project Manager after he/she has received written notice from the Service of its approval of the Minor Modification. If the Service rejects the Minor Modification, the Service shall notify the Project Manager in writing of the reason for its rejection. In either event, the Project Manager shall inform the Steering Committee of the Service's action in the matter.

14.2 Amendment of the Permit

The Permit may be amended only with the agreement of all the Parties. Any amendment must be in accordance with the ESA, the Service's permit regulations, and any other applicable law. Any party proposing an amendment to the Permit shall provide a statement of the reason for the amendment and an analysis of the environmental effects including its effects on the Parties, the Conservation Plan, and on Covered Species.

14.3 Annual Report

The Program Manager shall include the adoption of any Minor Modification or Amendment as part of the annual report required pursuant to section 7.4.1(J) of the FMA.

15. ASSURANCES AND COMMITMENTS

Each of the Parties affirms, acknowledges, and confirms each of its covenants, representations, agreements, undertakings, commitments, or assurances contained herein in the FMA, in the Permit and, in addition, makes the following commitments and assurances.

15.1 Implementation Assistance

Each Permittee shall, to the maximum extent practicable, cooperate with Reclamation to ensure that actions required for Conservation Measures are accomplished including, but not limited to, the purchase, acquisition, or lease of land and water. Permittees shall not unreasonably withhold any necessary approvals to accomplish the above listed actions.

15.2 Participation on LCR MSCP Committees

Each of the Parties shall provide staff to serve on LCR MSCP committees, as appropriate, and shall ensure, to the extent possible, staff participation in discussions and meetings with the other Parties to ensure that the implementation of the LCR MSCP is consistent with any findings upon which the Permit is based.

15.3 Assurances Regarding LCR MSCP

After opportunity for public review and comment, based on the best available current scientific and commercial data, the Service has found that the LCR MSCP, as implemented by this Agreement: (i) is consistent with and will complement other applicable conservation planning and regulatory programs and efforts addressing wildlife within the region; (ii) minimizes and mitigates, to the maximum extent practicable, the effects of the Covered Actions and Covered Activities on the Covered Species; (iii) will ensure that the measures agreed upon by the Permittees and the Service will be met; and (iv) will be implemented. The Service shall not take a position inconsistent with the

acknowledgments set forth in this section, including, without limitation, in the form of comments offered by the Service in the context of any process associated with approvals for Covered Actions and Covered Activities with regard to effects on Covered Species.

15.4 “No Surprises” Assurances

This is not intended to be applied before December 12, 2004 or applicable date pursuant to Spirit of Sage litigation in any U.S. District Court.

Provided that Permittees have complied with their obligations under the HCP, this Agreement, the FMA, and the Permit, the Service can require Permittees to provide mitigation only in accordance with applicable Federal law and regulations, including the “No Surprises” regulations published as of the Effective Date at 50 C.F.R. 17.22(b)(5), 17.32(b)(5), and subject to the funding requirements set forth in sections 8.5 and 9.9 of the FMA.

15.4.1 “Spirit of the Sage” Decision

This is not intended to be applied before December 12, 2004 or applicable date pursuant to Spirit of Sage litigation in any U.S. District Court.

On June 10, 2004, the court in *Spirit of the Sage Council v. Norton*, Civil Action No. 98-1873 (D.D.C.) ordered that until the Service completes a rulemaking on revocation standards for incidental take permits, the Service may not approve new incidental take permits or related documents containing “No Surprises” assurances. The order specifically allows for the Service to issue incidental take permits that do not contain “No Surprises” assurances. Therefore, the “No Surprises” assurances contained in the Program Documents are currently unenforceable and ineffective with respect to this Permit. The remainder of the Permit, this Agreement, and the HCP shall remain in full force and effect to the maximum extent permitted by law. In addition in the event that any future judicial decision or determination holds that the “No Surprises” assurances rule (or similar successive rule) is vacated, held unenforceable or enjoined for any reason or to any extent, subject to the provisions of section 18.13 of this Agreement, the Program Documents shall be enforceable only to the degree allowed by any such decision or determination; provided that the remainder of the Permit, this Agreement, and the HCP

shall remain in full force and effect to the maximum extent permitted by law. In the event that the “No Surprises” assurances rule is vacated, held unenforceable or enjoined by a judicial decision or determination, including the June 10, 2004, order described above, but is later reinstated to otherwise authorized, the assurances provided under the revised rule shall automatically apply to the HCP, this Agreement, and Permit in place of the “No Surprises” assurances provisions in the Program Documents. If, in response to any judicial decision or determination the “No Surprises” assurances rule is revised, the “No Surprises” assurances provisions in the Program Documents shall be automatically amended in a manner consistent with the revised rule so as to afford the maximum protection to the Permittees consistent with the revised rule. Pursuant to the June 10, 2004, order in *Spirit of the Sage Council v. Norton*, Civil Action No. 98-1873 (D.D.C), until the Service adopts new revocation rules specifically applicable to incidental take Permits, all incidental take Permits issued by the Service shall be subject to a general revocation standard in 50 C.F.R. & 13.28(a)(5). Additionally, notwithstanding anything to the contrary in this Agreement and the HCP, the Service retains statutory authority, under both sections 7 and 10 of the ESA, to revoke incidental take Permits that are found likely to jeopardize the continued existence of a listed species.

15.5 Future Recovery Plans

Each group of State Parties identified in section 1 of this Agreement shall be entitled to have a representative included on any recovery team designated to prepare a recovery plan for any Covered Species.

15.6 Future Designations of Critical Habitat

To the maximum extent allowed by applicable law, the Service shall give the Parties written notice of its intention to propose the designation of any Critical Habitat within the Planning Area. Any such notice shall be given to the Parties as early as possible in any Critical Habitat designation proceeding. The Federal Parties, as well as any group of State Parties, may designate a representative to represent it and may actively participate in discussions regarding the proposed designation. In its implementation of this section 15.6, the Service shall: (i) confer with the Program Manager and the Steering

Committee to identify what changes to the Conservation Plan, if any, would be sufficient to avoid such designation; and (ii) shall consider the conservation benefits to that species already provided by the LCR MSCP.

15.7 Revision of Critical Habitat Designation for Covered Species

The Service agrees, to the maximum extent allowable by law and regulation and Federal appropriations, and after public review and comment, to reassess and, if appropriate, revise the boundaries of existing designated critical habitat of Covered Species taking into consideration the impacts of critical habitat designation on the Parties.

15.8 No Further Mitigation

Consistent with 50 C.F.R. § 424.12, the LCR MSCP incorporates special management considerations necessary to conservation of Covered Species. If, notwithstanding the foregoing, Critical Habitat is designated or revised within the LCR MSCP Planning Area, no mitigation, compensation, conservation enhancement, or other protective measures other than those set forth in the Program Documents will be required of any Permittee in connection with Covered Activities.

15.9 Notification

If the Service is of the opinion that the LCR MSCP may not be fulfilling the conservation goals and objectives for any Covered Species it shall immediately report its concerns to the Program Manager and the Steering Committee, and work with the Program Manager and the Steering Committee to develop modified Conservation Measures, within the framework of the Conservation Plan and this Agreement, that are more likely to fulfill the conservation goals and objectives of the LCR MSCP.

15.10 Authority to Issue Permit

The Service, is fully authorized to, and concurrent with the execution of this Agreement and the FMA, shall issue the Permit pursuant to section 10(a)(1)(B) of the ESA as requested in the HCP filed by the Permittees to allow the incidental take of Covered Species as a result of Covered Activities occurring within the Planning Area during the term of this Agreement and the Permit.

15.11 General Obligations of Parties

Each Party shall fully and faithfully perform all obligations undertaken or assigned to them pursuant to the Program Documents.

15.12 Authority

Each Party represents and warrants for the benefit of every other Party hereto that: (i) the execution of this Agreement has been duly authorized; (ii) no other authorization or approval, whether of governmental bodies or otherwise, will be necessary in order to enable that Party to enter into and comply with the terms of this Agreement; and (iii) the person executing this Agreement on behalf of each Party has the authority to bind that Party.

16. THIRD PARTY TAKE AUTHORIZATION

16.1 Authorization

Incidental take of Covered Species by landowners, water rights owners, developers, farmers, and other private and public entities undertaking Covered Activities who are: (i) under the direct control of a Permittee in conformance with approvals granted by that Permittee and in compliance with the Permit, and this Agreement and the HCP; or (ii) subject to a Certificate of Inclusion authorized by the Participant Group for the State within which the activity is to occur, shall be considered authorized to take Covered Species pursuant to the Permit. A Certificate of Inclusion, approved by the Service, shall authorize the person, firm, or entity to take Covered Species as an incidental result of Covered Activities within the Planning Area pursuant to the terms of the Permit and this Agreement. Any such landowner, water rights owner, developer, farmer, or other private or public entity shall be a Third Party Authorized to Take. Permittees shall include as a part of any Certificate of Inclusion a condition requiring compliance with the Permit, the HCP, and this Agreement, describe the Covered Activity for which the Incidental Take Authorization was granted, and report the identity of such entity to the Program Manager in writing. The Third Party Authorized to Take shall receive an Incidental Take Authorization only if it is in full compliance with all requirements of this Agreement, the HCP, the Permit, any issued entitlements, and all

other applicable requirements. Any Third Party Authorized to Take may carry out the Covered Activity authorized by the Permit and shall have the same rights and obligations under this Agreement as the Permittees.

17. REMEDIES AND ENFORCEMENT

17.1 In General

The Parties agree to work together in good faith to resolve disagreements using informal meetings and conferences to reach mutually satisfactory conclusions to matters in dispute.

17.2 Alleged Default

In the event any Party fails or refuses to undertake or complete any obligation required by the Program Documents, the entity alleging such default shall notify the Party alleged to be in default, the Service, the Program Manager, and the Chair, who shall promptly notify all Members of the Steering Committee of the alleged default. The Party alleged to be in default shall be given reasonable opportunity to cure the alleged default.

17.3 Loss of ITA Benefits

Any Party who believes that a Permittee has failed or refused to undertake or complete any obligation required by the Program Documents or by any funding agreement entered into by such Permittee to provide for funding for the LCR MSCP, may request that the Service suspend or revoke that defaulting Permittee's ITA coverage unless and until the alleged default is cured or until it has been determined by the Service that the Permittee is not in default. The Service shall review any alleged default of any such Permittee pursuant to sections 6.4 and 6.5 of this Agreement.

17.4 Enforcement of Agreement and Remedies for Breach

Except as provided in section 17.5 of this Agreement, each Party shall be entitled to pursue legal action, including the filing of a suit for specific performance, declaratory relief, or injunctive relief to enforce and seek remedies for any breach of applicable

provisions of the Program Documents, including access to Federal courts under the Administrative Procedure Act (5 U.S.C. § 702 *et seq.*).

17.5 No Monetary Damages, Effect of Agreement on Pre-Existing Liabilities, and Enforcement Authority of the Service

17.5.1 No Monetary Damages

No Party shall be liable in monetary damages to any other Party or other person for any breach of this Agreement or the FMA, any performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement, or any other cause of action arising under this Agreement.

17.5.2 Retention of Liability

Each Party shall retain whatever liability it would otherwise possess for its present or future acts or failure to act in the absence of this Agreement.

17.5.3 Landowner Liability

All Parties shall retain whatever liability they would possess as an owner of interests in land in the absence of this Agreement.

17.5.4 Enforcement Authority of the Service

Nothing contained in this Agreement is intended to limit the authority of the Service to seek civil or criminal penalties or otherwise fulfill its enforcement responsibilities under the ESA and other applicable laws. However, as long as the HCP is being properly implemented in accordance with the Program Documents, the Service shall not seek civil or criminal penalties or otherwise enforce the take prohibitions of the ESA and other applicable laws for incidental take of Covered Species that is in accordance with the terms of the Incidental Take Authorization.

17.6 Effect of Federal Default

The Service agrees that a failure to comply with the applicable requirements of the LCR MSCP on the part of a Federal Party shall not result in the suspension or

revocation of the Permit as to those Permittees that are complying with the requirements of the LCR MSCP and the Permit.

18. MISCELLANEOUS PROVISIONS

18.1 Response Times

The Parties agree that time is of the essence in performance of the obligations of this Agreement. Except as otherwise set forth herein or as required by applicable laws or regulations, the Parties shall use reasonable efforts to respond to written requests within forty-five (45) Days.

18.2 No Partnership

Except as otherwise expressly set forth herein, neither this Agreement, nor any other Program Document shall make, or be deemed to make, any Party to this Agreement the agent for, or the partner or joint venture of, any other Party.

18.3 Nullification of Agreement

In the event that the Permit is revoked or substantially modified without the consent of the Parties, this Agreement shall be null and void and, in such event, no Party shall be bound by its terms.

18.4 Notices

18.4.1 Notice of Default, Suspension, or Revocation

Notices of default, suspension, or revocation shall be in writing, and either delivered personally, or by United States mail, certified and postage prepaid, return receipt requested to the addresses on file with the Program Manager. Notwithstanding the foregoing, notices may be delivered by facsimile or other electronic means, provided that they are also delivered personally or by overnight or certified mail. Notices shall be transmitted so that they are received within the specified deadlines. Notice delivered via certified mail, return receipt requested, shall be deemed received 5 business days after deposit in the United States mail. Notices delivered personally shall be deemed received

on the date they are delivered. Notices delivered via overnight delivery shall be deemed received on the next business day after deposit with the overnight mail delivery service.

18.4.2 Other Notices

All other notices required by this Agreement shall be in writing, and either delivered personally, or by United States mail, postage prepaid, or by facsimile or other electronic means to the addresses on file with the Program Manager.

18.5 Preparation by All Parties

This Agreement shall not be construed as if it had been prepared by any one Party, but rather as if all the Parties had prepared the Agreement.

18.6 Assignment or Transfer

This Agreement shall be binding on and inure to the benefit of the Parties, the Permittees, and their respective successors and assigns, including Third Parties Authorized to Take. Assignment or other transfer of the Permit or any rights or authorities granted thereunder shall be governed by ESA permit regulations.

18.7 Attorneys' Fees

If any action at law or equity, including any action for declaratory relief, is brought to enforce or interpret the provisions of this Agreement, each Party to the litigation shall bear its own attorneys' fees and costs, provided that attorneys' fees and costs recoverable by or against the United States shall be governed by applicable Federal law.

18.8 Elected Officials Not to Benefit

No member of, or delegate to, the United States Congress or the governing body of any of the Permittees shall be entitled to any share or part of this Agreement or to any benefit that may arise from it, except as a holder of an Incidental Take Authorization.

18.9 Availability of Funds

Implementation of this Agreement and the LCR MSCP by the Parties is subject to the requirements of the Anti-Deficiency Act, the laws of the States of Arizona, California, and Nevada, respectively, and the availability of appropriated funds.

18.10 Duplicate Originals

This Agreement may be executed in any number of duplicate originals. A complete original of this Agreement shall be maintained in the official records of each of the Parties hereto.

18.11 No Third Party Beneficiaries

Without limiting the applicability of rights granted to the public pursuant to the ESA or other applicable law, and except as specifically provided with respect to Third Parties Authorized to Take, this Agreement shall not create any right or interest in the public, or any member thereof, as a third party beneficiary hereof, nor shall it authorize anyone not a Party to this Agreement to maintain a suit under the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third party beneficiaries shall remain as imposed under applicable provisions of state and Federal law.

18.12 References to Regulations

Except as specifically provided in section 6.1 of this Agreement, any reference in this Agreement, the HCP, the BA, or the Permit to any regulation or rule of the Service shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken.

18.13 Changes in the Environmental Laws

It is acknowledged and agreed by the Service that the Permittees are agreeing to perform substantial avoidance, minimization, mitigation, Conservation Measures, and management measures as set forth in the HCP, the Permit, and this Agreement. If a change in, or an addition to, any Federal law governing or regulating the impacts of Covered Actions or Covered Activities occurs as they relate to Covered Species,

including, but not limited to, ESA and NEPA, the Service shall give due consideration to the measures required under the LCR MSCP in applying the new laws and regulations to the Permittees.

18.14 Severability

If any part or provision of this Agreement shall be held invalid or unenforceable by a court having jurisdiction under applicable law, said part or provision shall be ineffective only to the extent of such invalidity without in any way affecting the remaining parts of said part or provision or the remaining provisions of the Agreement. Notwithstanding the foregoing, in the event such invalidity or any rescission pursuant to this section alters the relative balance of benefits of the Parties to the significant disadvantage of a Party, the Parties shall attempt to negotiate a modification of the terms of the Agreement in order to reestablish the original balance of benefits, and if such agreement is not reached, the disadvantaged Party may rescind the Agreement.

18.15 Headings

The section headings used in this Agreement are for the convenience of the Parties and are not intended to be used as an aid to interpretation.

18.16 Faxed Signatures

Any Party may deliver its signed duplicate of this Agreement to any other Party by facsimile transmission, and such delivery shall be deemed made and completed upon receipt of such facsimile transmission by the other Party. Any Party delivering a signed duplicate by facsimile transmission shall promptly send the duplicate original bearing its original signature to the other Party, provided that a delay or failure to do so shall not negate the effectiveness of the delivery made by the facsimile transmission.

18.17 Further Instruments

Each of the Parties shall, promptly upon the request of another Party, execute, acknowledge, and deliver to the other any and all further instruments as are reasonably requested or appropriate to evidence or give effect to the provisions of this Agreement.

18.18 Force Majeure

If the Permittees are wholly or partially prevented from performing obligations under this Agreement because of unforeseeable causes beyond the reasonable control of and without the fault or negligence of the Permittees (Force Majeure), including, but not limited to, acts of God, labor disputes, sudden actions of the elements, or actions of non-participating Federal or state agencies or local jurisdictions, the Permittees shall be excused from whatever performance is affected by such unforeseeable cause to the extent so affected, and such failure to perform shall not be considered a material violation or breach, provided that nothing in this section 18.18 shall be deemed to authorize any Party to violate the ESA and provided further that: (i) the suspension of performance is of no greater scope and no longer duration than is required by the Force Majeure; (ii) within fifteen (15) Days after the occurrence of the Force Majeure, affected Permittees shall give the Service written notice describing the particulars of the occurrence; and (iii) Permittees use their best efforts to remedy their inability to perform (however, this section shall not require the settlement of any strike, walk-out, lock-out, or other labor dispute on terms which in the sole judgment of the Permittees are contrary to their interest).

18.19 Applicable Law

With respect to ESA, other Environmental Laws, and other applicable Federal laws, the laws of the United States shall govern the construction and interpretation of this Agreement. With respect to the state laws pertaining to the State Parties, the laws of their respective States shall govern the construction and interpretation of this Agreement. Further, nothing in this Agreement shall require any Party to: 1) violate any Federal statute or regulation, or 2) exceed its legal authority, as defined by applicable statute, regulation, rule, or order lawfully promulgated.

18.20 No Waiver

Neither approval of the LCR MSCP nor execution of this Agreement by a Party shall be construed, considered, or deemed to be a waiver of the right to any action, claim, cause of action or defense available to that Party prior to the execution hereof.

18.21 Migratory Bird Treaty Act Special Purpose Permit

The Permit issued pursuant to the LCR MSCP and this Agreement which allows the incidental take of any listed Covered Species shall, when such permit is effective as to such species, also constitute a special purpose permit pursuant to 50 C.F.R. § 21.27 to allow the take of species covered by such special purpose permit. Any such take shall not be in violation of the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-12). The special purpose permit shall be valid for a period of three years from its effective date, provided the Permit remains in effect for that period and for the species covered by such special purpose permit, subject to renewal as follows:

18.21.1 Automatic Renewal

Any special purpose permit as described in section 18.21 shall be automatically renewed, provided that the Permittees remain in compliance with the terms of the Permit and this Agreement. Each such renewal shall be valid for a period of three (3) years, provided the Permit remains in effect for such period and for such species.

18.22 Amendment to Implementing Agreement

This Agreement may be amended only by a writing executed by each of the Parties.

18.23 No Admission

Neither the application for the Permit nor the execution of this Agreement or any other Program Document by the Permittees shall be construed, considered, or deemed to be an admission by the Permittees that any take of any listed species has occurred or will occur.

**THIS AGREEMENT HAS BEEN EXECUTED ON THE DATE(S) SET FORTH
NEXT TO EACH SIGNATURE AND SHALL BECOME EFFECTIVE AS OF
THE DATE THAT THE SERVICE ISSUES THE PERMIT.**

Signature pages to follow when this Agreement is finalized.